IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

IN RE: DAVID C. NIBLACK, PETITIONER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, David C. Niblack, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on March 8, 1973.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit decided March 8, 1973, affirming petitioner's conviction is as yet unreported. A copy of the slip opinion (No. 72-1086) is attached hereto as Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on March 8, 1973. A subsequent petition for rehearing and/or suggestion for rehearing *en banc* was denied on June 5, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I

Whether an attorney's failure to appear in court at the time appointed constitutes a contempt punishable under Rule 42(a) of the Federal Rules of Criminal Procedure?

II

Whether petitioner's rights under the Fifth and Sixth Amendments to the Constitution were violated by the court's summary disposition of the charge?

STATUTES INVOLVED

Fifth Amendment to the Constitution. No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment to the Constitution. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

18 U.S.C. § 401. Power of Court. A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none others, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Federal Rules of Criminal Procedure

Rule 42. Criminal contempt.—(a) Summary disposition.—A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) *Disposition upon notice and hearing.*—A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant, or on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

STATEMENT OF THE CASE

Petitioner, a member of the bar of the United States District Court for the District of Columbia, was appointed to represent in that court one Malcolm Lee, who was accused of violating the National Firearms Act, 26 U.S.C. § 5861 (1970). At arraignment, where both the defendant, Lee and his counsel, David C. Niblack, were present, a date and time were set for a hearing in the matter.

At the appointed time for hearing, 9:30 a.m. on December 15, 1971, the petitioner was not present and did not arrive in court until 11:20 a.m., having been located by a United States Marshal in the Bar Associa-

tion library, situated in the same court house. Petitioner's proffered apology and/or explanation to the court was not accepted and he was adjudged in contempt. After a short recess and some discussion relating to the *Lee* case, an Order of Adjudication of Contempt, pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure, was served upon petitioner. See Appendix B attached hereto. The order provided that petitioner pay a fifty dollar fine or serve ten days in jail.

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Directly Conflicts With a Decision of the United States Court of Appeals for the Fourth Circuit in Which the Court found That an Attorney's Failure To Appear May Not Be Punished Summarily Under Rule 42(a) of the Federal Rules of Criminal Procedure.

In a nearly identical factual situation, the United States Court of Appeals for the Fourth Circuit in *United States* v. *Willett,* 432 F.2d 202 (4th Cir. 1970) found that the failure of an attorney to appear as scheduled, if contumacious, "was not an act committed 'in the actual presence of the court,' and therefore not punishable summarily under Rule 42(a) at p. 205. Significantly, in the *Willett* decision, the court discovered after its own investigation and relied heavily upon *Klein* v. *United States,* 80 U.S. App. D.C. 106, 151 F.2d 286 (1945), a case which preceded the Federal Rules of Criminal Procedure yet one that the Fourth Circuit found was reinforced by enactment of the Rules.

In contradistinction, in the instant case, the District of Columbia Circuit Court of Appeals distinguished *Klein* by stating that Klein's alleged contempt, his re-

fusal to return from New York and resume his place at the trial table, was not "misbehavior in the presence of the Court or so near thereto as to obstruct the administration of justice". See p. 3a of Appendix attached hereto. It is respectfully urged the District of Columbia Circuit misapprehended the difference between the power of a court to punish by contempt as opposed to going by way of indictment. See *In re Presentment by Grand Jury of Ellison,* 44 F. Supp. 375 (D.C. Del. 1942) *aff'd* 318 U.S. 791 and the power of the court to punish by way of contempt, summarily, under Rule 42(a), as opposed to the power to punish for contempt on notice and by way of hearing under Rule 42(b) of the Federal Rules of Criminal Procedure.

In a subsequent case involving interpretation of Rule 42(a) citiing as authority the case presently before the Court, the District of Columbia Circuit pointed out the desirability of proceeding by way of notice and hearing (as prescribed by Rule 42(b)) yet did not hold that procedure was mandatory. See *In re Gates,* – U.S. App. D.C. —, — F.2d —, D.C. Cir. 1973 (Slip opinion No. 71-1746 decided May 17, 1973). Therefore, although it cannot be said that there is a conflict between panels in the Court of Appeals for the District of Columbia Circuit, it would appear that, at the minimum, there is a philosophical divergence.

II.

Supervision Over and Interpretation of the Federal Rules of Criminal Procedure Is a Responsibility Unique to This Court.

Inasmuch as the Federal Rules of Criminal Procedure are creatures of the Court's Supervisory powers over the Federal Judicial System and are promulgated

under the specific auspices of the Court, the manner in which they are administered is of special and unique importance to the Court. Failure by the Court to supply a definitive ruling as to the circumstances which create such "an unusual situation" as to justify summary disposition of a contempt charge, see *Harris* v. *United States,* 382 U.S. 162 (1965) invites further conflict between circuits and defeats the purpose of the Federal Rules of Criminal Procedure, that is, to provide a uniform procedure for the administration of criminal justice in the federal courts.

III.

Unless Strictly Circumscribed, Rule 42(a) Is a Potential Vehicle for Arbitrary Abuse of the Contempt Powers of Federal Courts.

As the Court noted in *Sacher* v. *United States,* summary cotempt power is one that "always and rightly, is regarded with disfavor" 343 U.S. 1, at 8. Summary disposition of any criminal charge is, of course, totally inimical to the Anglo-American concepts of due process as embodied in the Fifth and Sixth amendments to the Constitution. That one attorney was summarily held in contempt of court for failure to be present at the appointed time and place can be of little importance to this Court, nor standing alone, should it be. However, the erosion of procedural regularity which such a summary disposition connotes is a danger against which this Court should vigilantly guard. It is noteworthy that the Court in *Harris* v. *United States, supra* noted with approval language from *Brown* v. *United States* that Rule 42(a) was reserved "for exceptional circumstances" and that the conclusion was reached in light of "the concern long demonstrated by

both Congress and this Court over the possible abuse of the contempt power" at 164. That a member of the bar engaged in the defense of a criminal matter should be subject to a procedure which is inherently hostile to the concept of due process raises a subtle but, nevertheless, viable possibility that without all the safeguards provided by Rule 42(b), that the climate of the case on trial could influence the ultimate decision in a matter of contempt.

In light of the volume of criminal cases heard in the United States District Courts, it is regrettable but nonetheless inevitable possibility that in the future some attorneys or for that matter witnesses, court personnel or even jurors will not be before the court at the time and place appointed. If such a failure to appear would subject these persons to contempt of court, it is incumbent upon this Court to clearly delineate the procedures to be followed in such an instance.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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Washington, D. C. 20001
Counsel for Petitioner

July 5, 1973

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter of U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before bond volumes go to press.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-1086

IN RE: DAVID C. NIBLACK, APPELLANT

Appeal from the United States District Court for the District of Columbia

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Decided March 8, 1973

Arthur J. Whalen, Jr., with whom *Joan M. McIntyre*, was on the brief for appellant.

Harold H. Titus, Jr., United States Attorney, *John A. Terry, Brian W. Shaughnessy* and *Gregory C. Brady*, Assistant United States Attorneys, were on the brief for appellee.

Before BAZELON, *Chief Judge*, ROBINSON and ROBB, *Circuit Judges*.

Per Curiam: This is an appeal from a conviction of criminal contempt pursuant to 18 U.S.C. § 401 (1970). Appellant, a member of the District of Columbia bar, was appointed by the district court to represent one Lee, who was charged with violations of the National Firearms Act. 26 U.S.C. § 5861 (1970). (*United States* v. *Malcolm D. Lee*, Criminal No. 2042-71). Lee was arraigned before a district judge on November 30, 1971. The appellant Niblack was present on behalf of his client and on that

date a motion hearing was scheduled for 9:30 A.M. on December 15, 1971.

Lee appeared at the appointed hour on December 15, 1971 but the appellant did not arrive until 11:20 A.M. After hearing the appellant's attempted explanation for his tardiness the district court found him in contempt and imposed a fine of $50.00 or imprisonment for ten days. The district judge observed that he had warned the appellant 'time and time again about being on time."

Relying upon *Klein* v. *United States*, 80 U.S. App. D.C. 106, 151 F.2d 286 (1945), and *Sykes* v. *United States*, 144 U.S. App. D.C. 53, 444 F.2d 928 (1971), the appellant contends that his conduct was not contempt in the actual presence of the court within the meaning of Rule 42(a) of the Federal Rules of Criminal Procedure and 18 U.S.C. § 401 (1970), and that his conviction therefore cannot stand.[1] We think the cited cases can be distinguished.

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[1] Rule 42(a), Fed.R.Crim.P. provides:

> SUMMARY DISPOSITION. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

18 U.S.C. § 401 provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Klein's alleged contempt was his refusal to return from New York to Washington and resume his place at the trial table. We held only that his action in New York was not "misbehavior in the presence of the court, or so near thereto as to obstruct the administration of justice." We recognized that as construed by the Supreme Court the words "so near thereto" have a geogpraphical connotation. Our opinion emphasized that the contempt proceeding was not for violation of a court order, since it was "not claimed or shown" that the court had entered any order directing Klein to return; thus the decision did not relate to contempt committed by violation of such an order. Here, as the district judge found, Niblack disobeyed the order that he be in court at a specified hour to proceed with a hearing. This misconduct was different from the attributed to Klein and clearly fell within the scope of 18 U.S.C. § 401(3).

In the *Sykes* case we held only that the evidence did not justify a finding that Sykes "deliberately or recklessly disregarded his obligation to the court, or that he intended any disrespect for the court"; in other words we held that the record disclosed "no evidence of any criminal intent on the part of" Sykes. We said there were no unusual circumstances warranting a conclusion that the conduct of Sykes was reckless, but on the contrary it appeared that his default had resulted from a lapse of memory and was an isolated aberration. We noted further that "[t]he judge prefaced his ruling with statements to the effect that he was reluctant to find the appellant in contempt, since he had 'very favorable experiences' with the appellant, who had 'served the court' ". In the present case, however, the district judge stated that the failure of Niblack to appear was not an isolated aberration but had "happened many times in the

past" and that the appellant had been repeatedly warned about such misconduct.[2]

In *Sykes* v. *United States* we discussed the *Klein* decision. Some clarification of that discussion may be appropriate. The *Klein* case did not hold that a failure to appear at a time ordered by the court could not be a contempt in the presence of the court; as we have said, the holding was only that Klein, in New York and under no order to appear, was not guilty of contempt in the presence of the court or so near thereto as to obstruct the administration of justice. In any event our discussion of the *Klein* ruling was not necessary to our decision with respect to Sykes, which rested on our analysis and evaluation of the evidence and our conclusion that the proof did not disclose any wilfulness on the part of Sykes.

We think the record in this case justifies the conclusion that the appellant's conduct was in reckless and wilful disregard of the court's order that he appear promptly for the scheduled hearing. Thus, the record supports a finding that the appellant's disobedience of the Court's order met the test of criminal intent applied in *Sykes* v. *United States*. We think also that when a lawyer, in wilful disregard of a court's order, appears almost two hours after the appointed hour he subjects himself to discipline pursuant to Rule 42(a), Fed.R.Crim.P.

The judgment is affirmed.

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[2] These facts should have been, but were not, recited in the order of contempt filed by the District Court pursuant to Rule 42(a), Fed.R.Crim.P. Nevertheless, since the appellant was fully advised of all the facts and circumstances upon which the district judge based his order, and was given an opportunity to respond, we think the omission does not warrant reversal. In the future, district judges should be careful to include a full statement of the facts in any order of contempt. *Cf. United States* v. *Schiffer*, 351 F.2d 91 (6th Cir. 1965), *cert. denied*, 384 U.S. 1003 (1966), *rehear. denied*, 385 U.S. 890 (1966).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 2042-71

UNITED STATES

v.

MALCOM LEE

Order of Adjudication of Contempt

Pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure, I hereby certify that I personally observed the contempt of Court hereinafter described, and that it was committed by David C. Niblack in the actual presence of the Court during the hearing on motions of a criminal proceeding before me entitled *United States* v. *Malcolm Lee*, Criminal No. 2042-71, on December 15, 1971. Said David C. Niblack was the attorney for the defendant in the case.

Hearing on the motions in this case was scheduled to commence on December 15, 1971 at 9:30 a.m. Mr. Niblack did not appear in court until 11:20 a.m. No valid excuse was offered.

I find that the said David C. Niblack was guilty of a breach of directions of the Court, that is, to be in Court at a given hour to proceed with the hearing on the motions in the case and that said breach constitutes contempt of Court.

Accordingly, it is, this 15th day of December 1971, hereby

ORDERED, ADJUDGED AND DECREED, that the said David C. Niblack is guilty of contempt of Court as aforesaid and his punishment be, and it hereby is, fixed at a fine of fifty ($50.00) Dollars or imprisonment for Ten (10) days.

BY THE COURT

JOHN LEWIS SMITH, JR.
Judge

APPENDIX C

Filed June 5, 1973

UNITED STATES DISTRICT COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1972

No. 72-1086

Criminal 2042-71

IN RE: DAVID C. NIBLACK, *Appellant*

Before: Bazelon, Chief Judge; Robinson and Robb, Circuit Judges.

Order

On consideration of appellant's petition for rehearing, it is

ORDERED by the Court that appellant's aforesaid petition is denied.

Per Curiam

For the Court:

HUGH E. KLINE
Clerk